Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
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Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	

OPPOSITION OF WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION TO VERIZON'S PETITION FOR RECONSIDERATION OF THIRD REPORT AND ORDER IN CC DOCKET NO. 96-115

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The Washington Utilities and Transportation Commission (WUTC) opposes the Verizon telephone companies' (Verizon) petition for reconsideration of the Commission's Third Report and Order[1] on telephone customer privacy protections in the above-captioned proceeding.

I. Introduction

In its Petition, Verizon does not seek change to customer privacy rules adopted by the Commission, and it is offers no evidence that the Commission failed to consider any of the extensive arguments and evidence that Verizon offered during the rule making comment process and in subsequent *ex parte* sessions. Rather, Verizon wants the Commission to reverse an act it did not take, namely the decision *not* to preempt state rules that were *not* even in effect at the time of the Third CPNI Order.

[1] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket No. 96-115, FCC 02-214, 17 FCC Rcd 14860 (July 25, 2002) ("Third CPNI Order").

Verizon seeks presumptive preemption – for the Commission to preempt rules that it has never seen and indeed that did not exist at the time Verizon filed its petition. Verizon offers draft rules of Washington and California in support of its plea for preemption, but the existence of these proposals does not support Verizon's case. Even if the case for preemption of these specific proposals were obvious, which it is not, that still would not justify presumptive preemption of all potential future state rules on telephone customer privacy. So severe a restriction on state efforts to protect consumers within their respective jurisdictions would require Verizon to show that every possible state rule conflicts with the Commission's regime, and Verizon has not made the case for this proposition.

II. Washington's CPNI Rule

The Verizon petition refers to and includes a proposed rule that the WUTC issued in April 2002.[2] This proposal ultimately was not adopted by the WUTC. The rule adopted by the WUTC on November 7, 2002,[3] is included in Appendix A to this filing. Because Verizon's request rests on the proposition that *every* potential state rule should be preempted, the WUTC will limit its discussion to the Washington rule as it was adopted.

The WUTC rule, like the privacy rule adopted by the Commission, applies different levels of protection to different types of customer information and different uses of that information. In most respects the two sets of rules are the same, but there are three key differences:

(1) The WUTC rule applies greater protection (opt-in rather than opt-out) to the detailed transaction information that shows to whom, when, and where a customer places

[2] Verizon Petition, at 4-5.

[3] The WUTC's rule will take effect on January 1, 2003.

telephone calls, even when that information is used by the telecommunications company and its affiliates;

(2) The WUTC rule applies greater protection (opt-in rather than opt-out) when customer proprietary network information is sold or otherwise provided to unaffiliated "contractor and joint venture partners;" and

(3) The WUTC rule includes more specific requirements on the notice and approval process itself.

The reasoning behind our rules is expressed in the adoption order, which is also in Appendix A.

In drafting the rules, the WUTC sought to minimize the differences between the rules that apply to Washington state customers and the national rules, and indeed the changes from our April proposal to our November final decision reflect that effort. However, in balancing the interests of telecommunications companies and their customers, the WUTC found that the greater use of opt-in approval was appropriate in the state of Washington.

In making this decision, the WUTC considered the arguments of the telecommunications companies that do business in Washington regarding their ability to conduct business here under a more protective privacy regime. The WUTC also explicitly considered and gave considerable weight to the Commission's expressed concern that it would not "take lightly the potential impact that varying state regulations could have on carriers' ability to operate on a multi-state or nationwide basis."[4] Finally, the WUTC recognized and accepted that it would be responsible,

[4] Third CPNI Order, ¶ 71.

based on its own record, to defend the rules from any court challenges that the telecommunications companies might bring.[5]

The additional protections in the WUTC rule are well-supported by the record in the WUTC rulemaking proceeding. This is true for two fundamental reasons. First, the WUTC record includes substantial involvement by telephone consumers. In telephonic comments, e-mail messages, and comments at public meetings, consumers firmly expressed their concerns about the use of private information by the telecommunications companies that are the conduit of that information. In particular, consumers objected to the use of detailed call information for any purpose outside the call itself and the related business transaction, and they objected to the sale or disclosure of that information to unrelated entities.

Second, the WUTC record includes an actual application of the opt-out approach that the WUTC found to be grossly inadequate. Briefly, in December 2001 Washington State's largest local exchange company, Qwest Corporation (Qwest), distributed opt-out notices as a bill insert. The notices were incomprehensible to most people. Moreover, those customers who came to understand the notices – often due to news media reports rather than the notice itself – found that the opt-out mechanisms established by Qwest did not work. Qwest was proposing to use customers' private information unless it heard an objection, yet there was no practical way for the customer to object. The WUTC found that this experience with the real-world problems of an opt-out method provided support both for a more restricted reliance on the opt-out method and its presumption of consent and for a more specific and extensive set of requirements on the notice and approval process itself.

[5] Three weeks after the WUTC adopted its rule, Verizon filed a complaint in U.S. District Court in Seattle seeking to enjoin its enforcement. *See Verizon Northwest, Inc. et al v. Showalter, et al.*, No. CV02-2342R (W.D. Wash., filed Nov. 21, 2002).

It is noteworthy that during the public outrage about Qwest's actions Verizon did not avail itself of the opportunity to provide the countervailing example to Qwest. Verizon is Washington State's second-largest local exchange company, and it also was planning to issue opt-out notices to its Washington customers in late 2001. Verizon could have attempted to demonstrate to the WUTC that the Qwest experience was an anomaly and that a carrier could distribute an opt-out notice that would be useful and informative to customers. Instead Verizon chose to wait, perhaps in the hopes that it could issue an opt-out notice later after the media spotlight was shining elsewhere.

III. State Measures to Protect Telephone Customer Privacy Will Not Negate the Commission's Authority

Verizon contends that the FCC must preempt state CPNI regulations because the failure to do so would negate the FCC's duty to implement national rules and would violate the First Amendment. Verizon's arguments ignore the states' traditional role in protecting the interests of consumers and presume that state CPNI regulations will violate the First Amendment.[6]

A. There Is a Need for State Protections of CPNI

Implicit in Verizon' argument is the contention that state protections of telephone customer privacy are unnecessary and improper in light of the Commission's national CPNI rules. However, there is room for and a need for state protections of telephone customer privacy. As the Commission well understands, state regulators have a duty to protect customers in their respective states.[7] This involves a close and comprehensive exercise of state police powers to oversee the business relationship between the regulated telecommunications company and its

[6] Verizon Petition, at 7-12.

customers. This oversight necessarily includes issues regarding the use of the private information about a customer that is a by-product of this business relationship, and state rules governing telephone customer privacy serve that purpose.

B. Failing to Presumptively Preempt State CPNI Regulations Does Not Violate the First Amendment

Verizon argues that the Commission's failure to presumptively preempt state telephone customer privacy protections violates the First Amendment.[8] In fact, Verizon goes so far as to say "no state record can be compiled that will satisfy the First Amendment."[9] The Commission should reject Verizon's invitation to preempt summarily all state CPNI statutes or regulations without so much as reviewing them.

1. *Opt-out is not the only customer notice mechanism that will satisfy the First Amendment*

Contrary to the statements Verizon makes in its petition, the Commission has not acknowledged that there is no substantial government interest in protecting intra-company disclosures of CPNI.[10] To the contrary, the Commission determined that the government has a substantial interest in ensuring that customers have the opportunity to approve or disapprove uses of their CPNI.[11] With respect to intra-company uses of CPNI, the Commission concluded that its

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[7] Third CPNI Order, ¶ 71 ("[O]ur state counterparts . . . bring particular expertise to the table regarding competitive conditions and consumer protection issues in their jurisdictions, and privacy regulation, as part of general consumer protection, is not a uniquely federal matter.").

[8] Verizon Petition, at 12-13.

[9] *Id.* at 13.

[10] *See id.* at 14.

[11] Third CPNI Order, ¶ 31.

previous opt-in rule could not be justified based on the record before it.[12] The Commission then determined that opt-out satisfies the First Amendment.[13] However, the Commission did not state that it would be impossible for an opt-in rule to pass First Amendment muster.

Verizon also misstates the holding of the Tenth Circuit regarding the constitutionality of opt-in notice requirements. The Tenth Circuit did not hold that opt-in violates the First Amendment, rather that court held that the Commission had not sufficiently justified its choice of opt-in.[14] Therefore, consistent with the Tenth Circuit's decision, the Commission properly affords state commissions an opportunity to develop a record that would support an opt-in notice requirement for intra-company CPNI.[15]

2. *States may show that opt-in serves a substantial state interest and that it is no more extensive than necessary to protect the government interest. The Commission will not violate the First Amendment by failing to preempt those efforts.*

Rather than consider preempting state CPNI regulations on a case-by-case basis, Verizon asks the Commission to prejudge all state telephone customer privacy protections and hold that the records upon which they are based do not demonstrate a substantial state interest in requiring opt-in customer notice or that opt-in is no more extensive than necessary to protect the government interest.[16] The Commission should decline to do so.

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[12] *Id.*

[13] *Id.*

[14] *US West, Inc. v. FCC*, 182 F.3d 1224, 1240 & n.15 (10th Cir. 1999), *cert. denied* 530 U.S. 1213 (2000).

[15] Third CPNI Order, ¶ 71.

[16] *See* Verizon Petition, at 14-18.

As set forth above and acknowledged by the Commission, states have an interest in protecting the privacy of their citizens. Some states have statutory or constitutional provisions that may compel greater protection of individual privacy than that afforded by the Commission's CPNI rules.[17] The Commission should not preempt the states' efforts to respond to the concerns of their citizens or implement their particular state laws. Rather, the Commission should preserve its balanced approach of considering preemption on a case-by-case basis.

The Commission will not violate the First Amendment simply by permitting states to consider opt-in customer notice rules.[18] Rather, states adopting opt-in rules have the burden to defend those rules against First Amendment challenges. In fact, the WUTC presently is defending a lawsuit brought by Verizon against the CPNI rules it adopted on November 7, 2002, in which Verizon has requested a preliminary injunction and a temporary restraining order against implementation of the WUTC's CPNI rules.[19] On December 20, 2002, the District Court determined that it would not rule on Verizon's request for preliminary injunction until the state has the opportunity to depose Verizon's witness Maura Breen, who had testified that the WUTC's CPNI rules would be damaging to the company. The Court also denied Verizon's request for a temporary restraining order. Thus, the Court saw no need to strike down the WUTC's rules without first conducting a thorough review.

Verizon's challenge to the WUTC's rules in federal District Court shows that it is unnecessary for the Commission to presumptively preempt state telephone customer privacy

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[17] Third CPNI Order, ¶ 71 & n.164.

[18] *See* Verizon Petition, at 20-22.

[19] *See supra. n.5.*

protections. By challenging the rules in court, Verizon has availed itself of an adequate remedy for rules that it alleges violate its First Amendment rights.

3. *By considering preemption on a case-by-case basis, the Commission does not interpret Section 222 in an unconstitutional manner*

In the same vein as the arguments stated above, Verizon contends that the Commission cannot allow states to consider opt-in regulations because to do so would be construing Section 222 in a way that renders the statute unconstitutional.[20] However, nothing about allowing states to consider opt-in rules renders Section 222 unconstitutional. Notwithstanding Section 222, states may have authority to implement opt-in requirements. If states were to adopt such opt-in requirements, it would be those statutes or regulations – not Section 222 – that would be at issue.

IV. Verizon's Request for Reconsideration Based on Alleged Difficulties in Complying With "Inconsistent" State Regulations Is Improper Under 47 C.F.R. § 1.429(b)

Verizon argues that the Commission should presumptively preempt state telephone customer privacy protections that are more restrictive than the Commission's CPNI rules because the different rules would make it more difficult for carriers to market their services to customers.[21] The Commission should reject this argument because the possibility of differing state regulations was well-known to Verizon during the Commissions rulemaking proceeding. Under the Commission's procedural rules, Verizon is not entitled to reconsideration based on facts that were known to it while the proceeding was pending. 47 C.F.R. § 1.429(b)(2). Verizon had informed the Commission that inconsistent state requirements may be difficult for carriers to administer and could have presented the information contained in the Declaration of Maura Breen at that time.[22] The information contained in the Declaration of Maura Breen is

[20] Verizon Petition, at 19-20.

[21] *See* Verizon Petition, at 9-12 & Appendix E (Breen Decl.).

[22] CC Docket No. 96-115, Verizon Feb. 20, 2002 *Ex Parte* Letter, Attach. at 4.

information that Verizon had the opportunity to present to the Commission at an earlier date.[23] Verizon attached to its Petition the WUTC's proposed CPNI rules that were issued in April 2002, and could have informed the Commission at that time regarding its concerns about the WUTC's proposed rules.[24] In addition, different state consumer and privacy protections are a fact of doing business on a national level and telecommunications companies will remain subject to potentially different state requirements.

V. Conclusion

The Commission made the right decision in adopting a case-by-case approach to reviewing potential conflicts in state privacy rules. All the arguments that Verizon makes in its petition were before the Commission when it issued the Third CPNI Order, and the Commission should not reconsider this decision regarding preemption.

Respectfully submitted,

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[23] Other parties had availed themselves of the opportunity to present their views regarding preemption of more restrictive state CPNI regulations. *See, e.g.*, Docket No. 96-115, Montana PUC Feb. 22, 2002, Letter; National Association of State Utility Consumer Advocates April 12, 2002 *Ex Parte* Comments; Qwest May 30, 2002 *Ex Parte* Letter.

[24] Ultimately, the WUTC did not adopt the rules proposed in April 2002. *See supra* text accompanying nn. 2-3.